LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 15 1968
JOHN F. DAVIS, CLERK

No. 1326

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

RUSSELL L. WOLDEN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

JAMES MARTIN MacINNIS
465 California Street
San Francisco, California
94104

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

Counsel for Petitioner

April 15, 1968.

Washington, D. C. - THIEL PRESS - 202 - 393-0625

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	17
Conclusion	23
Appendix (Opinion of Court of Appeal)	App. 1

CASE CITATIONS

Adjmi v. United States, 346 F.2d 654 (C.A. 5)	19
Brulay v. United States, 383 F.2d 345 (C.A. 9)	23
Burdeau v. McDowell, 256 U.S. 465	21, 22
Burton v. Wilmington Parking Authority, 365 U.S. 715	22
Calo v. United States, 338 F.2d 793 (C.A. 1)	19
Delaney v. United States, 199 F.2d 107 (C.A. 1)	18
Elkins v. United States, 364 U.S. 206	22
Estes v. Texas, 381 U.S. 532	17
Irvin v. Dowd, 366 U.S. 717	17
Jones v. United States, 362 U.S. 257	21
Mapp v. Ohio, 367 U.S. 643	22
New York Times v. Sullivan, 367 U.S. 254	18
People v. Martin, 45 Cal.2d 455	21
Reitman v. Mulkey, 387 U.S. 369	22
Rideau v. Louisiana, 373 U.S. 723	17
Sackler v. Sackler, 229 N.Y.S.2d 61	22
Sheppard v. Maxwell, 384 U.S. 333	17, 18, 19
United States v. Eversole, 209 F.2d 766 (C.A. 7)	20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

RUSSELL L. WOLDEN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment rendered in this proceeding on November 9, 1967, by the Court of Appeal of the State of California, First Appellate District, Division Three.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, appears at 255 Cal. App. 935 (advance sheets) and is reproduced in the appendix hereto. No other opinions were rendered in the proceedings below.

JURISDICTION

The opinion and judgment of the Court of Appeal were entered on November 9, 1967, affirming petitioner's convictions of May 28, 1966, in the Superior Court of the State of California in San Francisco. The Court of Appeal denied a timely petition for rehearing on December 8, 1967. Thereafter, on January 3, 1968, the Supreme Court of California denied a petition for hearing. On March 27, 1968, Mr. Justice Douglas signed an order extending the time for filing this petition for certiorari to and including April 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the massive, pervasive and prejudicial pretrial publicity concerning bribery charges against a public official, and a state court's refusal to postpone the trial of that official on such charges until the impact of such publicity had been dissipated, precluded the official from receiving a fair trial consistent with the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

2. Whether the concededly unlawful stealth of documents and records by a private citizen and the subsequent seizure of those documents by state prosecutors pursuant to a search warrant constituted an unreasonable search and seizure, in violation of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment, as to an individual against whom such documents and records are utilized to obtain a criminal conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

United States Constitution, Fourteenth Amendment:

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

1. Raising the federal questions

Petitioner, as a public official, namely the Assessor of the City and County of San Francisco, was convicted in the Superior Court of the State of California for the commission of the crimes of bribery (California Penal Code § 68) and conspiracy (California Penal Code § 182). The gist of such charges was that election campaign contributions received by petitioner were allegedly given for the purpose of influencing him in the official conduct of his public office.

In his trial and on his appeal, petitioner specifically preserved the following federal constitutional questions:

A. That the petitioner was deprived of his right to a fair trial in violation of the Sixth Amendment to the Constitution of the United States because of prejudicial pretrial publicity.

B. That the procurement of all evidence in the case was in violation of the Fourth Amendment to the Constitution of the United States, the product of unlawful search and seizure in that all of such evidence had been admittedly stolen from its lawful possessor.

2. Factual background

The petitioner RUSSELL L. WOLDEN had served as the Assessor of San Francisco for 28 years; in the summer of 1965, purely fortuitous circumstances resulted in the seizure by law enforcement officials, namely the Attorney General of the State of California and the District Attorney of the County of Alameda, of certain books, records and memoranda belonging to a tax consultant named JAMES TOOKE, the contents of which purported to establish dishonest dealings among TOOKE, the substantial taxpayers represented by him and various assessment officials of the Pacific Coast states.

The Assessor of Seattle, Washington, was indicted and convicted; the Assessor of San Diego County, California, committed suicide and his deputy was indicted in his stead; the Assessor of Alameda County, California, was indicted and convicted; the Assessor of Los Angeles County, California, was indicted and acquitted by direction of the Court.

In the case of the present petitioner, unlike the other cases flowing from the same source out of which other convictions were had, the conclusion of criminal culpability was inferential and depended upon the interpretation of complicated streams of circumstantial evidence. The trial transcript itself is some 6300 pages long.

3. Facts as to the search and seizure

As indicated, the source of all the evidence against the petitioner in this case was the records of the erring tax consultant, JAMES TOOKE. The story of the procurement of those records may be set forth as follows:

TOOKE, who represented numerous business clients in assessment matters throughout California and other parts of the general Pacific Coast area, harbored a jealous and vindictive office associate, one NORMAN PHILLIPS, who, having failed to obtain a partnership interest in TOOKE's business, backed a moving van against his employer's office

premises one weekend in the summer of 1965 and carried away, cabinets and all, the tax consultant's voluminous records of dealings with individuals and public officials covering years of dishonest endeavor. See Clerk's Transcript, 11, 42 et seq.

The original intention of PHILLIPS was to hold TOOKE's records for ransom and he apparently employed an attorney to represent him in such demands. At first he asked for $100,000, but when TOOKE, whose imagination carried no prescience of future events, appeared unyielding, he lowered his price and at one time evinced a willingness to settle for a permanent raise in salary. However, the content of JAMES TOOKE's records and paraphernalia was so inflammatory that word of their import was somehow transmitted to the San Francisco Chronicle and to the Office of the Attorney General. Too late, TOOKE filed a lawsuit in Alameda County Superior Court for the return of his chattels and papers. Process was issued, orders to show cause were calendared, but the Superior Court did nothing to implement the execution of its own process and it became clear that TOOKE would not be able to obtain protection against the release of his diaries and misdeeds from the court.

This posture of the problem is seen by the defendant's Exhibit Y, which the trial court permitted to be marked for identification but which was excluded from evidence proper. The colloquy surrounding this proposal of evidence is seen at page 2223 et seq. of the Reporter's Transcript. The TOOKE records, in gross, were marked for identification as Exhibit 127 at page 1803 of the Reporter's Transcript; the custodian of this cabinet of materials, an Alameda County law enforcement officer, testified briefly in the absence of the jury, supplementing the history already recounted with the information that while TOOKE was attempting to litigate his rights, the District Attorney of Alameda County obtained a search warrant from the Presiding Judge of the Alameda County Superior Court, based upon an affidavit of the same NORMAN PHILLIPS

who had stolen TOOKE's entire files and had attempted to extract from their owner a bounty in ransom-money.

PHILLIPS, by that time a confirmed ally of law enforcement, declared that the TOOKE records contained evidence of bribe-giving and related conduct on TOOKE's part in Alameda County, San Diego County, Contra Costa County and Orange County (*absent San Francisco* because, as discussed, the San Francisco evidence depended upon subtleties and nuances not seen in the various other prosecutions). PHILLIPS further declared that he could recognize such materials as those then stored in the Sheriff's Office of Alameda County.

While the civil process procured by TOOKE was ignored by the Presiding Judge in Alameda County Superior Court, the District Attorney's request was not; the same Court which had ignored TOOKE's requests issued the search warrant and the TOOKE files were then surrendered to the prosecutors' world.

It was petitioner's persistent claim that the later capitulation of TOOKE, who was persuaded to become a prosecution witness in the various counties and to waive any privilege against search or seizure which he might otherwise have possessed; was meaningless in view of the foregoing account of the procurement of these materials.

When the WOLDEN trial was called, the petitioner, before the calling or seating of any prospective juror, moved the court to exclude from the record all testimony, documents, records, identities of persons and events, and all potential evidence of any kind or character having its source, or flowing from, or obtained as a result of information derived from the TOOKE files, papers and memoranda. This objection was made upon the ground that, despite the fact that PHILLIPS, the admitted thief, was not a member of law enforcement personnel, the seizure nevertheless represented a violation of the Fourth Amendment to the Constitution of the United States and of the correlative rights set forth

in Article 1, Section 19 of the Constitution of the State of California. The objection was overruled.

In the decision below affirming WOLDEN's convictions, not one word appears concerning petitioner's properly raised claim that these facts constituted an unlawful search and seizure, in violation of the Fourth Amendment as incorporated by the Fourteenth Amendment.

4. Facts concerning the pre-trial publicity

Prior to the impanelment of the jury, the petitioner moved for an indefinite stay or continuance of the trial because of the impact on his constitutional right to a fair trial of the prejudicial pre-trial publicity in all news media. The claim was made and evidence was introduced to demonstrate that the total atmosphere created by such publicity was inflammatory to an extreme and almost indescribable degree. See Reporter's Transcript 1.11 et seq.

In the presentation of this matter, great quantities of newspaper stories relevant to WOLDEN, printed between July, 1965, and February 21, 1966, were docketed for the court's inspection. While the District Attorney declined to enter into a stipulation to the effect that radio broadcasts and television releases generally contained the same material in relation to the petitioner as the newspaper stories, the trial judge assisted in the preservation of the record by making a ruling which was tantamount to a taking of *judicial notice*. He said:

> ". . . In view of the fact that there are gentlemen from the various news media here today, representing television, radio and newspapers, the court can generally assume that the radio and television outlets have made broadcasts of general news items concerning this matter."
>
> [See Special Exhibits 1-42, Id. and Reporter's Transcript 1.23]

Among the excerpts from stories then offered for the trial judge's consideration, labeled Exhibit 1 in support of the

motion (and now lodged with this Court), were the following:

(1) When WOLDEN surrendered at the Hall of Justice after his original Indictment, the San Francisco Chronicle pictured him on its front page standing behind bars; the same picture found repetition throughout the country over wire services, etc. Television releases depicted WOLDEN's plea of not guilty as ludicrous; an end-of-the-year show upon Channel 5 presented a prosecution story without any hint that WOLDEN might possess a defense, climaxed by a picture of his submitting to the fingerprinting process.[1] See Special Exhibits, noted *supra,* Reporter's Transcript 1-24 et seq.

(2) A widely read columnist, MR. DICK NOLAN of the San Francisco Examiner, wrote the following:

[See Reporter's Transcript 1.18 et seq.]

> "Isn't it a scandal the way the WOLDEN case has been continued? Wasn't it so very nice that the trial judge was so courteous to MR. WOLDEN that he gave him a long continuance merely because (his counsel) happened to be engaged in another trial. What is the matter with the courage of our judges? Not one local judge had the nerve to take the case, they all said that they knew MR. WOLDEN."

(Certainly the intended effect of the material last quoted was to test the mettle of prospective jurors and to remind them that they must be crusaders, etc., because otherwise all officialdom was part of a plot to whitewash MR. WOLDEN.)

(3) Newspapers of July 14, 1965, showed headlines and stories as follows:

> Taxpayer's Gripes
> Wolden Suspends Top Aide Here
> Tax Assessor's Aides on Private Payroll

---

[1] Petitioner was indicted twice; the second indictment, upon which he was actually tried, has the addition of Count Eleven as well as the minor changes in the overt acts alleged as part of the conspiracy count.

A Tax on SF Assessments
SF Tax Roll
7 County Assessment Probe On

[See Reporter's Transcript 1.24]

(4) Newspapers of July 24, 1965 contained headlines and stories bearing the following titles:

Big Tax Scandal Is Getting Bigger
Pay-off Probe in 7 Counties
Strange Odyssey of the Files According to Tooke Records
Prosecutor D.A. Goes To See Wolden
Prosecutor Wages Fight To Open Tax Quiz Files
Want To See Pay-off Clues

[See Reporter's Transcript 1.24]

(5) Newspapers of July 25, 1965 contained headlines and picture with story as follows:

Wolden Is Accused of Taking Tax Case Bribe
Campaign Gifts To Tax Assessors
Tax Scandal Grows, May Involve Millions
How Tax Scandal Was Discovered

[See Reporter's Transcript 1.24-1.25]

(6) The same San Francisco Examiner columnist, DICK NOLAN, wrote columns devoted to WOLDEN's troubles on July 26, 28 and 29, 1965, under the following sub-headlines:

More on Taxes, Wolden's Method
Wolden Whimsy, Tax Grievance
Notes on Wolden, Help from Los Angeles
The Tax Inquiries, Big Question
A Cynical Tax Gimmick

[See Reporter's Transcript 1.24]

(7) Newspapers of July 27-28, 1965 carried headlines (with stories) stating:

SF Assessor Wolden Accused in Tax Case
Ferdon Vows Long Full Assessor Probe
D.A. Eyes Wolden Files

Grand Jury Summons Wolden in Tax Case
Wolden Still Not In as D.A. Waits
D.A. Acts To Get Files in Tax Scandals
Tax vs. Loquacious Assessor

[See Reporter's Transcript 1.25]

(8) The July 28, 1965 papers also contained, other than on the front page, a story about "Wolden's Lush Bay Estate" topped by a photograph of property owned by the Assessor on the Peninsula and carrying hints of lavish parties, late hours, high living.

[See Reporter's Transcript 1.25]

(9) On July 29, 1965, the newspaper headlines and stories began with:

Attorney Tells D.A. Wolden Paid Off
LA Assessor Rips Wolden
Wolden Job Depends on Jury
Wolden Should Step Aside

the last being a San Francisco Examiner editorial.

[See Reporter's Transcript 1.25-1.26]

(10) In relation to the balance of July, the court was shown the following newspaper headlines (followed by stories):

Lynch Starts Big Scale Probe of Tax Scandal
Tax Scandal, IRS Demands Peek at Files
Tax Files Given to Prosecutors
Lynch Tax Scandal Probe
Wolden Brags on San Francisco Assessing
Will Wolden Take the Fifth?
Wolden's Top Aide Says He Passed Along Fees
Tax Scandal Files Ordered Released
Secret Records in Tax Scandal Open for D.A.

[See Reporter's Transcript 1.26-1.27]

(11) The tempo of such news stories and their prominence as matters of public interest continued without abatement through August up to September 3, the day of the

Indictment. Representative headlines and stories, culled from the same exhibit, are:

Wolden Grand Jury Together Four Minutes
Ferdon Gets the Files in Tax Scandal
An Assessor Now and Then

(The article last mentioned informed the public that WOLDEN was guilty of absenteeism, etc.)

A Number of New Checks Traced in Assessor's Scandal
Wolden Refuses To Open Records
Wolden May Have To Talk SOS on Tax Probe
Taxpayers' Suit and the DA
May Make Wolden Talk
State Failure in Assessor Scandals
Mystery Woman in Tax Probe
DA Plans Move on Wolden
Special Boot Camp for Assessor Scandal Probers

(This last was in reference to the intensive training on assessment law offered interested California prosecutors in relation to an inflexible 25% assessment ratio, etc.)

DA Probes Spending by Wolden, Wife
Wolden May Yield Files
Contempt Order Filed on Wolden
Jury Can See Wolden Files in Tax Probes

(12) When WOLDEN surrendered on the afternoon of his Indictment, September 3, and submitted himself to the regular processes of fingerprinting, etc., pictures of him behind what appeared to be the bars of a prison were released for reproduction throughout the United States. These pictures are reproduced herein in this petition. Between the middle of September and the follow-up stories on the Indictment and the end of the year, one may scarcely find consecutive days during which RUSSELL L. WOLDEN was not front page material. Some of these were:

Wolden Old Hand at Facing Storms
Assessor's Long and Profitable Career

SAN FRANCISCO EXAMINER

SAN FRANCISCO CHRONICLE

Assessor Probe, More Witnesses
Tooke Only Small Fry
DA Sifts Wolden Files
Grand Jury Grills Tooke in Tax Case
Missing Wolden Files Smuggled to DA's Safe
Wolden Files on Tooke Clients Are Missing
Wolden Gets Judge's Deadline
Wolden OK for any San Francisco Trial Judge
DA Says Wolden Is Holding Out
Angry Reply in Assessor's Tax Scandal
Astonishing Code in Assessed Value
It's No Crime to bribe an Assessor in California, it just looks bad

[See Reporter's Transcript 1.30-1.31]

(13) A local headline was entitled "Assessor Gets a Rolls Royce". It was only by reading the entire story that the reader might discover the subject to be a different assessor than MR. WOLDEN.

(14) By December a new onslaught had developed. Here one may find stories discussing the general subject that the City and County had lost money which ought to be recovered. Typical were:

Recover Lost Taxes in San Francisco
Assessor Probe
A Threat on Funds Lost by Wolden
Assessments, a Threat of Action

[See Reporter's Transcript 1.31-1.32]

(15) Other matters which touched upon issues ultimately presented to the trial jury were also discussed in advance by the newspapers, without any attempts to diminish the thought that the accusations were already proved. Of this ilk were:

Jury Told How Wolden Got a Plush Apartment
$38,500 Gift
Wolden Is Indicted Again
Clean House
Demos Hit in New Tax Scandal Quiz

Sales Price and Assessment Compared
Grand Jury Airs Wolden's $38,500 Apartment Deals
Wolden's Bank Ties

[See Reporter's Transcript 1.35-1.36]

Such headlines and stories were interspersed with other matters of reportorial moment, viz: How WOLDEN's bank accounts were subpoenaed, how the Grand Jury was continuing its investigation, how WOLDEN received thousands of dollars in campaign contributions, how it was difficult to obtain a willing trial judge.

[See Reporter's Transcript 1.35-1.36]

(16) One week before the trial, the same San Francisco Examiner writer, DICK NOLAN (whose interest extended recently to writing a column on the length of time consumed in the preparation of the present appeal) wrote a column entitled "A Scandal in San Francisco" containing the following excerpts:

[See Reporter's Transcript 1.32 et seq.]

> "The scandal within a scandal in the great assessment scandal is the tolerance, official, semi-official, and just plain public with which San Francisco is viewing the proceedings. Russell L. Wolden is under indictment charged with taking bribes for handing out tax breaks for the favored. One would expect some show of alacrity on the part of the community dealing with such a situation, yet the matter drags on in an appalling way. Shall we review:
>
> "Wolden is indicted, and all public officials, including our Honorable Judges, run for cover. After some preliminary time wasting we have to import a retired Judge from another county to hear the case, our guys want no part of it. Then it develops that Wolden's lawyer has another case which (why?) must be given precedence over the Wolden trial. The Court graciously grants a long postponement.
>
> "Somebody asked Mayor Shelley, 'Why should an indicted Assessor stay on the public payroll while he is awaiting the alleged process of justice' and

Shelley mumbles something and the indicted Assessor keeps on drawing his pay. For months, the Board of Supervisors, which is charged with the duty of overseeing taxes and assessments (it's our Board of, you should pardon the expression, Equalization) carefully looks out the window.

"Assessment scandal, there's no assessment scandal; who, what, where?

"But this is Assessor Russell L. Wolden of the dynasty Woldens, grantor of favors to many of the mighty, if the charges contained in the indictment are to be credited as anything more than frothy gossip. For icing on the cake, Wolden announces that he is a candidate for re-election, confidently predicts he'll get re-elected and City Hall cynics wouldn't bet you otherwise.

"Wolden's deft and sardonic touch is such that it scares everybody who might be thinking of running for the job of Assessor, except Supervisor Jack Morrison, who is making mild noises like a candidate, not too loudly, not in any spirit of public indignation, sort of 'in case' candidacy.

"The whole sorry affair is shot through with novocaine. Everybody about it is a little numb as befits the public conscience as represented by numb Judges, numb officials, and a long benumbed electorate."

(17) In all that has been suggested above, the news stories were abetted by the voices of radio newscasters and the visual glimpses of public events as released through television. The San Francisco Chronicle scarcely allowed the story to disappear for so long an interval as a day; the Examiner, while less persistent, unleashed MR. DICK NOLAN in instances beyond those which have been quoted.

All efforts to secure a continuance of the trial because of this pre-trial publicity were rejected by the trial judge, and the jury trial commenced on schedule, resulting in petitioner's convictions. On the appeal, the Court of Appeal below held (see Opinion, App. p. 8, *infra*):

"The record fails to show that pretrial publicity in any way restricted the choice of fair and impartial jurors. Our review convinces us that newspaper and other publicity during trial would not, if known to the jury, have affected the result. Moreover, the trial court repeatedly admonished the jury not to read or listen to any reports relating to the trial."

REASONS FOR GRANTING THE WRIT

1. The decision below raises important constitutional considerations as to whether a state criminal trial of a public official should be postponed until the effects of massive, pervasive and prejudicial pretrial publicity have been dissipated.

The critical and unavoidable question raised by the decision below is whether petitioner's conviction can stand in light of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, particularly as interpreted and applied in *Rideau v. Louisiana*, 373 U.S. 723, *Estes v. Texas*, 381 U.S. 532, and *Sheppard v. Maxwell*, 384 U.S. 333. Given the pervasive and overwhelming assault upon the petitioner in the public news media preceding the trial, the constitutional inquiry imposed by those rulings is whether the petitioner was tried "in an atmosphere undisturbed by so huge a wave of public passion." *Irvin v. Dowd*, 366 U.S. 717, 728. And to provide an appropriate response to that inquiry in this case necessitates not only an examination of the facts but an exploration of several important aspects of the constitutional fair trial doctrine, an exploration that merits the grant of certiorari.

(a) Is an elected public official like the petitioner entitled to the same constitutional guarantee of a fair trial as was accorded the private citizens involved in *Rideau*, *Estes* and *Sheppard*? Petitioner suggests that an affirmative answer to that question is not only dictated by the equality implicit in the concepts of due process and fair trial but is made even more obvious by the necessity of insuring fairness to the type of individual who perhaps is most suscepti-

ble to public prejudice—the accused public official. And at a time when numerous public officials are being charged with crimes, it is appropriate for this Court to underscore the fact that such individuals share in the constitutional promise of a fair trial.

A negative answer to that question might be implied from an assertion that the news media were here doing no more than exercising their First Amendment right to criticise and comment on a public official. Cf. *New York Times v. Sullivan,* 376 U.S. 254. But such an answer would raise a most serious collision between the constitutional right to comment and the constitutional right to a fair trial. As yet, nothing that this Court has said would indicate that a defendant, whatever his office or station in life, somehow loses his right to a fair trial because the distillers of public prejudice are operating under the cloak of the First Amendment.[2]

(b) Does the fact that the petitioner failed to seek a change of venue preclude application of the constitutional fair trial principle? The decision in *Sheppard v. Maxwell,* 384 U.S. 333 at 363, would appear to provide the controlling answer to that problem: "But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

In other words, where a defendant is confronted with a widespread and prejudicial atmosphere engendered by the public press, he is not under a constitutional mandate to seek a change of venue. As was held in *Delaney v. United States,* 199 F.2d 107, 116 (C.A. 1), such a defendant "is

---

[2]Equally irrelevant is the claim of the prosecutor below that neither he nor his office was responsible for the fomenting of any unfair news releases or other prejudicial information. Reporter's Transcript 1.47, et seq. A free trial atmosphere is no less polluted by pervasive and prejudicial publicity simply because such publicity may not have emanated from the prosecutor's office.

not obliged to forego his constitutional right [under the Sixth Amendment] to an impartial trial in the district wherein the offense is alleged to have been committed." He may, instead, pursue the alternative remedy suggested by *Sheppard* of having the case continued indefinitely "until the threat abates." That is what the petitioner here sought, particularly in view of the wideness of the publicity that made it impossible to find another California venue free of prejudice. The constitutional propriety of such a choice of remedies, and indeed the constitutional necessity of postponing a trial in these circumstances until the prejudice has abated, needs further implementation by this Court.

(c) Was the burden on the prosecution to prove that the massive pre-trial publicity had abated or was non-prejudicial in nature? The nature of the widespread publicity attendant upon the charges against petitioner was plainly such as to poison and prejudice the public mind with respect to petitioner's guilt or innocence. The headlines and news accounts previously detailed had such an impact upon the San Francisco public that it was scarcely possible to enter any gathering of local citizens without hearing the epithets "Crook" and "Robber" thrust upon the petitioner. The publicity, to put it mildly, was such that it would ordinarily result in prejudice, and did in fact result in prejudice.

Having demonstrated the existence of such massive pre-trial prejudice, petitioner submits that, as a constitutional requirement, the burden shifted to the prosecution to prove that the prejudice had either abated or was ineffective relative to the particular jury and trial. The First Circuit intimated as much in *Calo v. United States*, 338 F.2d 793, 795, when it ruled in a similar situation that "this publicity was so massive and so timed that the defendant made a prima facie showing and the government should have been the one to seek to establish that no juror had had these matters come to his attention." See also *Adjmi v. United States*, 346 F.2d 654, 659 (C.A. 5).[3] And such a burden was not met through

[3]The court in the *Adjmi* case ruled that "When during the course of the trial counsel for the appellants brought to the court's attention

the ruling of the court below (App. p. 8, *infra*) that "the trial court repeatedly admonished the jury not to read or listen to any reports relating to the trial." More than mere admonishments would be needed to assure the erasure of the massive prejudicial impact of the publicity.

It is important that this Court establish the authoritative guidelines respecting the burden of proof in such situations. And the Court has the opportunity to do so here against the backdrop of an extensive pre-trial campaign of public prejudice, seldom if ever equalled where a public official's right to a fair trial is at stake.

2. The decision below raises important constitutional questions as to the propriety of the prosecution's use of evidence unlawfully stolen from the owner.

As a general proposition, it is true that one who has no proprietary or possessory interest in premises searched or property seized is not in a position to claim that his rights under the Fourth Amendment have been violated by an unreasonable search and seizure. See, e.g., *United States v. Eversole*, 209 F.2d 766, 768 (C.A. 7). But the fact that the evidence used against this petitioner had been seized upon a search warrant directed toward an acknowledged thief raises quite different and important considerations under the Fourth Amendment, as well as the Due Process Clause of the Fourteenth Amendment.

Had the state or county law enforcement officers themselves stolen the TOOKE records in this case and then used them to secure petitioner's conviction, it would appear axiomatic that the principles of the Fourth Amendment and of the Due Process Clause would have been violated. And if that be true, how can the state authorities avoid the application of those principles if they knowingly rely upon the

---

the prejudicial newspaper accounts and moved for a mistrial, *the court had a duty to inquire* whether the articles had created prejudice in the minds of the jurors." [Emphasis added.]

prior actions of a private burglar who stole the documents? Can the law enforcement officers, through the device of a search warrant directed at the burglar, take advantage of the corrupt fruits of a fortuitous or coincidental burglary? Can a prosecuting agency, because of its original innocence of the theft of documents, nevertheless adopt and exploit the unlawful motives of the admitted thief?

While the traditional indicia of some sort of proprietary interest in the seized property is usually a prerequisite to a Fourth Amendment claim, this Court in *Jones v. United States*, 362 U.S. 257, 266, indicated that "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost every other branch of law, has been shaped by distinctions whose validity is largely historical." And in the *Jones* case, itself, this Court recognized the right of a person legitimately on the premises of a friend to challenge the legality of a search of the premises where the fruits were proposed to be used against that person.

There thus may be room within the Fourth Amendment for a defendant to challenge the use of evidence, of which he had no proprietary interest in the historical sense, obtained by a search whereby law enforcement officers have traded "the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them," *People v. Martin*, 45 Cal.2d 455.

On the other hand, this Court in *Burdeau v. McDowell*, 256 U.S. 465, held that the Fourth Amendment guarantees are not violated if federal prosecutors, to whom incriminating papers stolen by private persons have been delivered, retain them for use in subsequent grand jury and trial proceedings. Unlawful acts of individuals in which the government has no part were said not to constitute governmental action for purposes of the Fourth Amendment. Mr. Justice

Brandeis, joined by Mr. Justice Holmes, strongly dissented (256 U.S. at 477):

> "Still, I cannot believe that action of a public official is necessarily lawful because it does not violate constitutional prohibitions, and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the comman man's sense of decency and fair play."

It is questionable whether the *Burdeau* ruling has survived the Court's later decisions in *Elkins v. United States*, 364 U.S. 206, and *Mapp v. Ohio*, 367 U.S. 643, though neither of those decisions mentions *Burdeau*.[4] At least one state court judge has questioned whether *Burdeau* any longer "survives as a precedent compelling the admission of illegally obtained evidence . . . [and] Even if a vestige of its authority remained, it was obliterated by *Mapp*." *Sackler v. Sackler*, 229 N.Y.S.2d 61, 65-70 (Christ, J., dissenting).

Moreover, in view of the expanded concepts of governmental action, see *Reitman v. Mulkey*, 387 U.S. 369, and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, it seems doubtful that the *Burdeau* notion that governmental action was lacking in the prosecutor's knowing use of documents stolen by a private individual would any longer be followed. And if the state officers may thus be said to have been involved, for constitutional purposes, in the unlawful seizure of the documents, it may be that the time has come

---

[4] Mr. Justice Frankfurter's dissent in *Elkins* twice mentioned Mr. Justice Brandeis' *Burdeau* dissent with seeming approval. 364 U.S. at 235 and at 250.

for this Court to emphasize, as the Ninth Circuit recently did, that "the law is violated in Fourth Amendment cases when the illegal search takes place. At that moment the violation of the Constitution is complete. The fruits of the illegal search are rejected not because the Constitution expressly requires it, but because it is inappropriate to sanction the previous violations of law by federal [or state] officers." *Brulay v. United States*, 383 F.2d 345, 349, fn. 5 (C.A. 9).

CONCLUSION

For these various reasons, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

JAMES MARTIN MacINNIS
465 California Street
San Francisco, California
94104

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

Counsel for Petitioner

April 15, 1968